STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals and the Circuit Court for the County of Macomb)

JENNIFER L. HUDOCK and
BRIAN D. HUDOCK,

Plaintiffs-Appellees,

-vs-

EDWARD SCHULAK, HOBBS &
BLACK, INC., Architects and Consultants,

Defendant-Appellant.
_____/

Supreme Court No: 126859
C.O.A. No: 245934
L.C. No: 00-1912 CE

SULLIVAN, WARD, ASHER & PATTON, P.C.

APPELLANTS' REPLY BRIEF

PROOF OF SERVICE

RONALD S. LEDERMAN (P38199)
Attorney for Defendant-Appellant
Edward Schulak, Hobbs & Black, Inc.
1000 Maccabees Center
25800 Northwestern Highway
P. O. Box 222
Southfield, MI 48037-0222
(248) 746-0700

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases:

Statutes:

Rules:

STATEMENT OF ISSUES PRESENTED

I. **DOES THE TWO YEAR STATUTE OF LIMITATIONS FOR MALPRACTICE CLAIMS, MCL 600.5805(6), APPLY INDEPENDENTLY OF THE SIX YEAR STATUTE OF REPOSE TO PROFESSIONAL NEGLIGENCE CLAIMS AGAINST ARCHITECTS AND ENGINEERS?**

Defendant-Appellant says "Yes."

Plaintiffs-Appellees say "No."

The trial court said "Yes."

The Michigan Court of Appeals said "No" while creating a split of authority on the issue.

II. **DOES THE TWO YEAR STATUTE OF LIMITATIONS FOR MALPRACTICE CLAIMS APPLY OVER THE THREE YEAR GENERAL NEGLIGENCE – LIMITATIONS PERIOD IN THIS ACTION FOR PROFESSIONAL NEGLIGENCE AGAINST ARCHITECTS?**

Defendant-Appellant says "Yes."

Plaintiffs-Appellees say "No."

The trial court said "Yes."

The Court of Appeals did not address this issue.

REPLY ARGUMENT I

THE TRIAL COURT CORRECTLY GRANTED SUMMARY DISPOSITION IN FAVOR OF DEFENDANT DUE TO THE EXPIRATION OF THE TWO YEAR STATUTE OF LIMITATIONS GOVERNING PROFESSIONAL MALPRACTICE ACTIONS, WHICH IS NOT SUPERSEDED BY THE SIX YEAR STATUTE OF REPOSE APPLICABLE TO A CERTAIN CLAIMS AGAINST ARCHITECTS.

A. Plaintiffs have raised new legal arguments which are not properly preserved for Supreme Court review.

Plaintiffs raised new arguments in their Appellees' Brief which are not properly preserved for Supreme Court review because they were not raised in either the trial court or the Michigan Court of Appeals.

The first such "new" legal argument raised by the Plaintiffs is that MCL 600.2957(2) provides for the "relation back" of the First Amended Complaint to the date of the filing of the original Complaint (May 10, 2000) because the First Amended Complaint was filed after Defendant-Appellant Edward Schulak, Hobbs & Black was named as a Non-Party at Fault. To reiterate, Plaintiffs have raised this argument for the first time in their current Appellees' Brief filed with the Supreme Court. Plaintiffs did not raise this argument in either the trial court or the Michigan Court of Appeals. The argument is therefore not properly preserved for appellate review. People v Carines, 460 Mich 750; 597 NW2d 130 (1990) [appellate consideration of an unpreserved claim of error is disfavored].

In any event, the argument is substantively without merit.

In this regard, in Staff v Marder, 242 Mich App 521; 619 NW2d 57 (2000), the Michigan Court of Appeals held that MCL 600.5957 conflicts with MCR 2.112(K), the latter of

which does not contain a "relation back" provision and instead "creates an orderly method for adding new parties that takes into account the need for a reasonable time frame for identification of the parties and the right to not be prejudiced as a result of the parties' failure to act diligently in the pursuit of their claims." 242 Mich App at 532. The Staff Court concluded that the "relation back" provision of MCL 600.2957(2) conflicted with both MCR 2.112(K), 2.111(F) and 2.118(B). Consequently, the Staff Court held that the statutory "relation back" provision could not be enforced. 242 Mich App at 532-535.

Yet, this action against the Defendant-Architect would still be untimely even if Plaintiffs' Amended Complaint related back to the date of the filing of the initial Complaint, May 10, 2000. As a matter of law, Plaintiffs' claim must be deemed to have accrued in April of 1998, the time upon which Defendant is deemed to have rendered its last professional service regarding the building as a matter of law. **Indeed, Plaintiffs specifically alleged in their Second Amended Complaint that the Defendants-Architects, "on or about April of 1998 . . . prepared plans and specifications for the remodeling at Plaintiff's place of employment" (Apx 27a). It was also on that date that Plaintiffs' employers began their occupancy in the building (Apx 6a, Paragraph 2). Thus, Plaintiffs' initial Complaint was required to have been filed within two years after that date (e.g., April of 2000) to be timely.** Plaintiffs however did not file their initial Complaint until May 10, 2000, more than two years after their claim against Defendant accrued. Thus, even if Plaintiffs' Amended Complaint related back to the filing of the original Complaint on May 10, 2000, their claim would nonetheless be barred by the two year period of limitations.

Secondly, Plaintiffs now improperly argue for the first time that their claim did not accrue until the date of their last exposure to the subject formaldehyde, in August of 1998.

However, the "last exposure" cases cited by Plaintiffs, Traver Lakes v Douglas, 224 Mich App 335; 568 NW2d 847 (1997) and Garg v Macomb County Community, 472 Mich 263; 696 NW2d 646 (2005), did not involve allegations of malpractice against a state licensed professional. Architect malpractice actions are instead governed by the "accrual" provision of MCL 600. 5838(1), (e.g., accrual upon acceptance, occupation or use) Male v Mayotte, Crouse, 163 Mich App 165, 169; 413 NW2d 698 (1987).

B. MCL 600.5839 does not apply to the exclusion of MCL 600.5805.

Plaintiffs erroneously argue that current MCL 600.5805(14) is unambiguous in requiring that MCL 600.5839's six year statute of repose also serves as a statute of limitations to the exclusion of § 5805's two year limitation period applicable to malpractice actions and the three year limitations for general claims against contractors.

Plaintiffs cite to no current authority prior to the issuance of the Court of Appeals' Opinion in this action that found the existence of such an unambiguous dictate in § 5805(14) [formerly § 5805(10)]. Further, Plaintiffs continue to ignore that as far back as Michigan Millers Mutual Insurance Company v West Detroit Building Company, 196 Mich App 367; 494 NW2d 1 (1992), the Michigan Court of Appeals recognized that the language of then § 5805(10) was ambiguous and susceptible to more than one interpretation in this regard. 196 Mich App at 374-375. Hence, the subsequent ruling in Witherspoon v Guilford, 203 Mich App 240, 245-246; 522 NW2d 720 (1994) that the intent of the Legislature in enacting the former § 5805(10) was not to lengthen the limitations period otherwise applicable to claims against architects, engineers or contractors, but rather to protect those entities from indefinite liability by granting "§ 5839 primacy over other arguably applicable periods of limitations, running

from the time of discovery, whose effect would defeat the repose aspect of § 5839." 203 Mich App at 245-246.

Indeed, the fact that current MCL 600.5805(14) states that "the period of limitations for action against a state licensed architect, professional engineer... based on an improvement to real property shall be as provided in § 5839" does not mean that § 5839 operates to lengthen the statute of limitations period to the exclusion of a shorter two year period set forth in MCL 600.5805. Rather, the language of § 5805(14) is reasonably construed consistent with the recognition that MCL 600.5839 has both a "limitations and repose effect" as explained in the dicta of O'Brien v Hazelet & Erdal, 410 Mich 1; 299 NW2d 336 (1980). Moreover, the language of MCL 600.5805(14) does not necessarily mean that the period of limitations must always be six years and always runs from the date of "use, occupancy or acceptance" (the language of § 5839). As the O'Brien Court did observe in this regard:

> As one Court of Appeals panel explained, the instant statute is both one of limitation and one of repose. [footnote omitted] For actions which accrue within six years from the occupancy, use, or acceptance of the completed improvement, the statute prescribes the time within which such actions may be brought and thus acts as a statute of limitations. When more than six years from such time have elapsed before an injury is sustained, the statute prevents a cause of action from ever accruing. The plaintiff is not deprived of a right to sue a state-licensed architect or engineer because no such right can arise after the statutory period has elapsed. [footnote omitted]
>
> To a plaintiff whose injury occurred and whose right of action thus vested shortly before expiration of the six-year period, the statute arguably might deny due process by failing to "afford a reasonable time within which suit maybe brought.
>
> 410 Mich at 14-15.

O'Brien cited with approval the analysis of Oole v Oosting, 82 Mich App 291; 266 NW2d 795 (1978). There, the Court of Appeals explained the manner in which MCL 600.5839

may operate as a statute of limitations without necessarily abrogating the operation of the limitation periods of MCL 600.5805:

> As to causes of action which accrue prior to the expiration of six years, the statute is one of limitation, because it requires that the action be brought within a specified period of time. If a cause of action accrued near the end of the six-year period, and a discovery period could not be read into the statute, a person may not have a reasonable period of time within which to bring suit, and the statute may operate to deprive that person of his cause of action without due process. However, plaintiffs' injuries occurred after the expiration of the six-year period.
>
> * * *
>
> Because a person may not maintain a cause of action after six years, the statute operates to prevent a cause of action from ever accruing where the injury occurs more than six years after the time of occupancy. The cause of action is abrogated before it comes into existence. Consequently, an injured party cannot be deprived of a cause of action without due process of law. The Court in *Dyke v Richard* recognized that a statute of limitation which operates to abrogate a cause of action may be sustainable as a statute of repose.
>
> 82 Mich App at 299.

MCL 600.5805(14) thus contemplates that § 5839 may have both a "limitations and repose effect" consistent with the above analyses. Indeed, where a malpractice claim against an architect or engineer accrues more than four years, but less than six years after "occupancy of the completed improvement, use or acceptance of the improvement," § 5839 will have a "limitations" effect because it eliminates an otherwise viable claim upon the expiration of the six year period even though the claim had accrued less than two years earlier. Under this analysis, § 5839 would govern even though MCL 600.5805(6) would provide a longer period of time for the claimant to bring the action.

In contrast, where a claim has not yet "accrued" notwithstanding that a period of greater than six years running from "occupancy of the completed improvement, use or acceptance of the improvement" has expired, § 5839 will have a "repose" effect because it prevents a claim which has not yet accrued from ever accruing.

For this reason, MCL 600.5805(14)'s contemplation that § 5839 will set forth a prescribed period of limitations in specified actions against architects does not support the Court of Appeals' analysis below and the Plaintiffs' current legal arguments that § 5839 nullifies the two year period of limitations set forth for professional malpractice actions in § 5805 where the claim accrued between zero and four years following "occupancy of the completed improvement, use or acceptance of the improvement."

REPLY ARGUMENT II

THE TWO YEAR STATUTE OF LIMITATIONS FOR MALPRACTICE CLAIMS APPLIES OVER THE THREE YEAR GENERAL NEGLIGENCE LIMITAITONS PERIOD IN THIS ACTION FOR PROFESSIONAL NEGLIGENCE AGAINST ARCHITECTS.

In their Appellees' Brief, Plaintiffs argue that even if Witherspoon, supra, applied to this action, it would only compel application of the three year general negligence period of limitations set forth in MCL 600.5805(8). Plaintiffs, however, ignore that while Witherspoon indeed applied the general negligence-three year limitations period, the defendant asserting the statute of limitations defense there was a contractor sued for negligence -- rather than a state licensed architect or engineer subject to the professional malpractice statute of limitations. This distinction is consistent with the controlling standards which dictate that determining which statute of limitations is to be applied is governed not by any technical labels supplied by plaintiff, but instead by the type of interest harmed and the gravamen of the action in its entirety. Simmons v Apex Drug Stores, Inc, 201 Mich App 250, 253; 506 NW2d 562 (1993).

Plaintiffs also continue to erroneously cite to City of Midland v Helger Construction Co, 157 Mich App 644; 398 NW2d 481 (1987) and City of Marysville v Pate, Pirn & Bogue, 154 Mich App 655; 397 NW2d 859 (1986) in arguing that the two year limitations period for malpractice actions may properly apply only to lawsuits between architects and owners, while § 5839 applies to the exclusion of § 5805 to lawsuits filed by third parties. Plaintiffs continue to ignore, in this regard, that City of Midland, supra, and City of Marysville, supra, were superseded by Michigan Millers Mutual Ins Co v West Detroit Building Co, Inc, supra, and Witherspoon, supra, which together recognized that the legislature's intent in amending § 5805

to add the current § 5805(14) was to assure application of the statute of repose set forth in § 5839 to all actions against architects, engineers and contractors on the basis of an improvement to real property. See, e.g., 196 Mich App at 378. City of Midland, supra, and City of Marysville, supra, simply do not support application of the three year general negligence statute of limitations over the two year professional malpractice limitations period in this action.

Finally, Plaintiffs erroneously assert that the two year malpractice limitations provision of MCL 600.5805(6) may not apply to this action because MCL 600.5838(2) specifies the accrual of a malpractice action "at the time that person discontinues serving the plaintiff in a professional or pseudo professional capacity as to the matters out of which the claim for malpractice arose...." MCL 600.5838(1). Plaintiffs thus assert that their claim does not sound in malpractice because they were not the Defendant's client and Defendant did not otherwise "serve" them in a professional capacity.

Contrary to this assertion, a malpractice claim may arise out of the "serving" of the plaintiff even if the plaintiff did not have a direct client relationship with the defendant. Michigan jurisprudence indeed permits a professional malpractice action to be filed by a nonclient of the defendant so long as there is the provision of proof of the plaintiff's status as an intended beneficiary of the professional services. Beaty v Hertzberg & Golden, PC, 456 Mich App 247, 256; 571 NW2d 716 (1997), Commissioner of Insurance v Albino, 225 Mich App 547, 569; 572 NW2d 21 (1997). In this sense, a claimant need not be in privity of contract with an architect in order to have been intended to benefit from the architect's professional services. In the specific context of this action, any individual with intended access to the structure in question is an intended beneficiary of the architect's proper performance of his professional services.

Plaintiffs finally the import of the caselaw cited in Argument II of the initial Appellant's Brief filed by the Defendant, e.g., Sam v Balardo, 411 Mich 405; 308 NW2d 142 (1981), et al., which define the extent to which an action constitutes a claim for professional malpractice subject to the professional malpractice statute of limitations. Defendant incorporates by reference the analysis set forth in its initial Appellant's Brief as requiring application of the two year statute of limitations to this action.

Respectfully submitted,

SULLIVAN, WARD,
ASHER & PATTON, P.C.

By: _____

RONALD S. LEDERMAN (P38199)
Attorney for Defendant-Appellant
1000 Maccabees Center
25800 Northwestern Highway
P. O. Box 222
Southfield, MI 48037-0222
(248) 746-0700

Dated: October 13, 2005

W0431397